No. 89-299

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES W. KEMPE, JR. and MICHAEL J. ARNOLD,
in their capacity as Joint Liquidators of
Mentor Insurance Limited,
Petitioners,

v.

OCEAN DRILLING & EXPLORATION COMPANY, *et al.*,
Respondents,

and

PINNACLE REINSURANCE COMPANY LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Although petitioners have posed three questions at the outset of their petition, they have abandoned the second question by failing to explain in the body of their petition why it merits this Court's consideration and have waived the third by failing to raise it in the courts below. There is, therefore, only one question properly presented by the petition. Respondents submit that that question should be restated as follows:

> Whether the inclusion of a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO") automatically immunizes a complaint from a motion to dismiss on *forum non conveniens* grounds.

STATEMENT PURSUANT TO RULE 28.1

Respondent Ocean Drilling & Exploration Company ("ODECO") is the corporate parent of respondent Mentor Holding Corporation. Mentor Holding Corporation has no subsidiaries (except wholly-owned subsidiaries) or affiliates.

ODECO has a corporate parent, Murphy Oil Company, which owns 60.9% of ODECO's stock. ODECO has no affiliates, but it does have the following subsidiaries which are not wholly-owned: Ben-Odeco (Bermuda) Limited, Ben-Odeco Drilling Limited, Pyramid Drilling S.A. and Ben-Odeco Limited.

Respondent Pinnacle Reinsurance Company Limited ("Pinnacle") is wholly owned by Risk Management Holdings, which is wholly owned by C.E. Heath Underwriting (Holdings), which is wholly owned by C.E. Heath PLC. Pinnacle has no affiliates or subsidiaries other than wholly-owned subsidiaries.

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STATEMENT OF THE CASE

Applying the factors set forth by this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), and *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), the District Court granted respondents' motion to dismiss the complaint on *forum non conveniens* grounds, holding that the petitioners, who are the liquidators of a Bermuda insurance company appointed by the Bermuda Supreme Court,

must bring their complaint in Bermuda. The District Court expressly found that Bermuda would provide petitioners with complete redress for any wrongdoing committed by respondents. It also held that the parties' private interests in the availability of documents and witnesses located in Bermuda and the public interest in having important issues of Bermuda law and insurance accounting practice decided by a Bermuda court militated in favor of dismissal of the U.S. action. The Fifth Circuit Court of Appeals affirmed. The facts upon which those decisions were based are as follows.

The petitioners were appointed by the Bermuda Supreme Court to wind up the affairs of Mentor Insurance Limited ("Mentor"), a company organized by special act of the Bermuda Parliament and managed and operated throughout its existence in Hamilton, Bermuda. Mr. Kempe is a Bermudian and a principal partner of one of Bermuda's largest accounting firms. Mr. Arnold is an accountant-liquidator who resides in England.

The dispute between the parties in this case centers on whether certain reinsurance agreements between Mentor and another Bermuda company, Pinnacle Reinsurance Company Limited ("Pinnacle"), were properly accounted for in Mentor's 1982 and 1983 financial statements. Petitioners have alleged that the Pinnacle agreements did not provide for a transfer of risk and therefore should not have been used to reduce Mentor's reported loss reserves. Petitioners claim that the true nature of the Pinnacle agreements was concealed from Mentor's government-approved Bermudian accountants, Peat Marwick-Bermuda, who certified its financial statements for the years in question. Respondents, on the other hand, contend that the Bermudian accountants were aware of the nature of the Pinnacle agreements and properly approved Mentor's financial statements in accordance with gen-

erally accepted accounting principles as required by Bermuda law.[1]

After Mentor was put into liquidation in 1985 by the Bermuda government, petitioners brought two suits in the United States. They brought one suit in state court in New York against Peat Marwick alleging that the accountants acted negligently in auditing Mentor's financial statements. That suit was dismissed in part on *forum non conveniens* grounds in February 1989, and petitioners have now brought suit against Peat Marwick in Bermuda.

Petitioners also brought the present suit in federal district court in Louisiana against Pinnacle and against Mentor's parent company, Mentor Holding Corporation ("MHC"), MHC's parent company, Ocean Drilling & Exploration Company ("ODECO"), and a number of individual officers and directors of Mentor, MHC and ODECO. Petitioners' complaint alleged that dissemination of Mentor's allegedly false financial statements in the years 1982 and 1983 constituted fraud, negligent misrepresentation, and a violation of RICO. In addition to attacking the accounting treatment accorded the Pinnacle agreements, petitioners also sought to pierce the corporate veils of Mentor and MHC to hold ODECO responsible for Mentor's debts and to hold each of the individual defendants liable for allegedly breaching their fiduciary duties to Mentor.

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[1] Under Bermuda law, Mentor and other Bermuda insurers must annually file an audited financial statement with the government. That statement must be signed by at least one Bermudian director, by the company's resident manager, and by its Bermudian auditor. The insurance company's auditor must be approved by the government at the time of the company's registration and cannot be changed without governmental approval. Only chartered accountants resident in Bermuda and affiliated with the Canadian Institute of Chartered Accountants can be approved.

In their original complaint, petitioners also sought to hold seven of the defendants liable for the entire deficiency in the Mentor estate, on the ground that those defendants had violated Bermuda's fraudulent trading statute by continuing to operate a company they allegedly knew had no reasonable prospects of paying its debts. After it was pointed out that a claim for fraudulent trading could be heard only by the Bermuda court responsible for winding up Mentor's affairs, petitioners amended their complaint by substituting a declaratory judgment count seeking to have the same defendants held liable for the entire deficiency, but on an unspecified legal theory.

Respondents filed a motion to dismiss the complaint on *forum non conveniens* grounds, arguing that petitioners should pursue their claims against respondents in Bermuda instead of Louisiana. The District Court agreed. In its opinion, the District Court addressed each of the factors identified by this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), and *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), and concluded that all of them militated in favor of trial of the case in Bermuda.

First, the court found that Bermuda is both an adequate and an available forum. Petn. at C-5-C-7. All of the respondents are amenable to or have agreed to submit to jurisdiction there and have waived any defense of laches or statute of limitations. Although petitioners will not have a RICO claim in Bermuda, the court found that they could pursue all of their underlying substantive claims in the Bermuda courts and have the right to full remedies, including punitive damages and attorneys' fees, if they prevail on the merits of their claims. As the District Court observed:

> If the defendants have perpetrated the fraudulent and negligent acts covered by the complaint, we are confident that a Bermuda trial court will see to it

> that defendants make good whatever harm they did, contrary to plaintiffs' repeated representations that defendants will go unpunished if they are not tried here.

Petn. at C-14.

Second, the court found that the private interests of the parties favor litigation in Bermuda. Petn. at C-7-C-10. The court noted that most of the relevant documents are located in Bermuda. These documents include not only the records of Mentor and Pinnacle, but also the records of other Bermudian accountants and insurance companies necessary to prove respondents' contention that Mentor's treatment of the Pinnacle agreements was in accordance with generally accepted accounting principles as applied in Bermuda.

The court also concluded that Bermuda is the forum where the largest number of witnesses whose live trial testimony is important to both sides can be compelled to appear. Petn. at C-10. Respondents identified numerous residents of Bermuda, not amenable to trial subpoenas in the United States, whose live testimony is important to their defense, including the Peat Marwick-Bermuda accountants who reviewed Mentor's financial statements and whose understanding of the Pinnacle agreements is one of the key factual issues in the case. By contrast, petitioners were able to identity only three potential non-party witnesses who are subject to trial subpoena in New Orleans.

Finally, the District Court found that trial in Bermuda is in the public interest. Petn. at C-12-16. In reaching that conclusion, the court focused on Bermuda's pervasive regulation of the insurance industry in general and of the accounting practices of Bermuda insurance companies in particular, as well as Bermuda's interest in the liquidation of Mentor. The court concluded that any possible interest Louisiana might have in the litigation is dwarfed

by Bermuda's interest in the proper resolution of a controversy involving accounting practices in one of Bermuda's most important industries. As the court explained:

> The alleged injury herein occurred to a Bermuda corporation whose affairs are being wound up under the laws of Bermuda, with any recovery going to the estate in receivership. It further appears that Bermuda has the third largest reinsurance market in the world; the regulation of insurance reflects Bermuda's interest in maintaining its credibility as an international insurance center. R.D. 195, Exhibit 3B at 3-8. More particularly, these regulations required of Mentor annual audits, and the propriety of these audits as reflected in Mentor's financial statements for the fiscal years 1982 and 1983 is at the very heart of this lawsuit. We find that it follows ineluctably that with respect to the accounting practices challenged by plaintiffs in this suit, Bermuda has an interest dwarfing any this forum might have (which largely consists in the Louisiana residence of most of the defendants).

Petn. at C-12.

The District Court also found that an additional factor —the avoidance of unnecessary problems in conflicts of law and in the application of foreign law—favors trial in Bermuda. Petn. at C-14. It noted that trial of this case would entail the application of Bermuda law to at least two of petitioners' claims, the claim to pierce the corporate veil and the breach of fiduciary duty claim. Based on two days of hearings in which leading experts differed substantially as to the proper application of Bermuda law to the allegations of petitioners' complaint, the court recognized that respondents' "pending choice of law motion would involve the court in those very labors that the doctrine of *forum non conveniens* has repeatedly been recognized as being meant to prevent." Petn. at C-14.

On the basis of this detailed analysis, the District Court granted respondents' motion for a *forum non conveniens* dismissal subject to a number of conditions designed to ensure that petitioners will not be prejudiced by the dismissal. These included a six-month stay of the dismissal order to enable the parties to complete non-party discovery in the United States, a stipulation by respondents that they would submit to the jurisdiction of the Bermuda courts in response to any suit asserting any claims arising out of the acts or transactions referred to in petitioners' amended complaint and would waive laches, statute of limitations and timeliness defenses with respect to such claims, and a stipulation by respondents that any final judgment obtained against them by petitioners in Bermuda would be afforded full faith and credit in the United States. Respondents were also required to stipulate that they would give evidence at trial and produce documents in their possession, custody and control as if they, their employees and their documents were located in Bermuda.

After the six-month discovery period, the District Court entered a final order dismissing the complaint. On appeal, the Fifth Circuit affirmed. The main focus of the Court of Appeals' decision was petitioners' contention that the assertion of a RICO claim immunized their complaint from *forum non conveniens* dismissal. The court held that the analysis set forth in *Piper Aircraft Co.* v. *Reyno*, *supra*, applies to RICO claims and that under that analysis the District Court had not abused its discretion in dismissing the case in favor of Bermuda as the more appropriate forum. The Court of Appeals denied rehearing en banc, without any member of the court requesting that the court be polled. Petn. at B-2.

Petitioners filed their petition for certiorari on August 19, 1989. That petition should be denied for the reasons set forth below.

REASONS FOR DENYING THE WRIT

I. PETITIONERS CHALLENGE SETTLED LAW AS TO WHICH THERE IS NO CONFLICT IN THE CIRCUITS

A. Petitioners Challenge Settled Law.

Petitioners' main argument is that this Court, in an exercise of its "supervisory role," should "define the extent of a district court's jurisdiction to procedurally destroy federal RICO substantive rights through a *forum non conveniens* dismissal." Petn. at 5. In other words, petitioners ask the Court to decide whether the lack of one particular basis for recovery in Bermuda bars a federal court from even considering dismissal of the action on *forum non conveniens* grounds.

Curiously absent from this section of the petition is any reference to *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), where this Court decided that precise question. In *Reyno*, the District Court had dismissed the action on the ground that the Scottish plaintiffs should proceed in Scotland, where the accident had occurred and many of the witnesses were located. The Court of Appeals reversed, holding that a case should never be dismissed on *forum non conveniens* grounds where the law in the alternative forum is less favorable to the plaintiff.

This Court reversed the Court of Appeals' decision and reinstated the dismissal. The Court held, in no uncertain terms, that the possibility of less favorable legal theories or remedies in the alternative forum cannot be used to defeat a motion to dismiss on *forum non conveniens* grounds unless the remedy available in the alternative forum is so clearly inadequate or unsatisfactory that it is tantamount to no remedy at all:

> The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground

> of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.
>
> * * *
>
> Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice. In these cases, however, the remedies that would be provided by the Scottish courts do not fall within this category. Although the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly.

454 U.S. at 247, 254-55 (footnotes omitted).

In the present case, petitioners' Bermuda law experts testified and the District Court found that all of petitioners' claims can be asserted in the alternative forum provided by the Bermuda courts under the rubrics of fraud, negligent misrepresentation, breach of fiduciary duty and piercing the corporate veil. In addition, in Bermuda petitioners will be free to litigate the claim they could not pursue in an American court for recovery of the deficiency in Mentor's estate under Bermuda's fraudulent trading statute. Although petitioners cannot assert a RICO claim in Bermuda, they are not losing the benefit of any substantially different theory of recovery inasmuch as their RICO claim merely restates the same allegations and claimed damages that provide the basis for their fraud claim. In that respect, petitioners in this case are certainly in no worse a position than the plaintiffs in *Reyno*, who had to prove negligence in a Scottish court, rather than relying on the theory of strict liability in a United States court.

At most, what petitioners will lose by going to Bermuda is the opportunity to obtain treble damages under RICO. As this Court held in *Reyno*, however, the mere possibility that the damage award might be lower in a foreign forum cannot provide a basis for concluding that the forum is inadequate. If petitioners prevail on their common law claims or their claim under Bermuda's fraudulent trading statute, they will be entitled to full compensatory damages and attorneys' fees.[2] They may also be entitled to punitive damages.

As the District Court observed in granting respondents' motion to dismiss, "[i]f the defendants have perpetrated the fraudulent and negligent acts covered by the complaint, we are confident that a Bermuda trial court will see to it that defendants make good whatever harm they did." Petn. at C-14. Given that determination, it certainly cannot be said that Bermuda law is "so clearly inadequate or unsatisfactory that it is no remedy at all." *Reyno*, 454 U.S. at 254. Under the settled law of *Reyno*, the mere fact that petitioners cannot pursue a RICO claim for treble damages in Bermuda does not defeat respondents' motion to dismiss on *forum non conveniens* grounds.

B. The Decision Here Does Not Raise A Significant Issue And There Is No Conflict In The Circuits.

The issue of whether a RICO claim can be dismissed on *forum non conveniens* grounds in favor of a foreign forum arises very rarely. Indeed, in the almost twenty-year history of RICO, there have been only a handful of reported cases involving this issue. Thus, as a matter of judicial economy, the relationship between RICO

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[2] Bermuda law is, in fact, more favorable on the issue of attorneys' fees than American law. Bermuda applies the English rule, awarding attorneys' fees to the prevailing party as a matter of course.

and *forum non conveniens* analysis is hardly the type of issue that demands a place on this Court's docket.

Equally important, the only two Circuits that have discussed the issue have both agreed that the inclusion of a RICO claim does not immunize a complaint from dismissal in favor of a foreign forum. Like the Fifth Circuit in the case at bar, the Second Circuit in *Transunion Corp.* v. *Pepsico, Inc.*, 811 F.2d 127 (2d Cir. 1987), upheld the dismissal of a RICO claim under the analysis set forth in *Reyno*, rejecting the argument that the presence of a RICO claim precluded the district court from exercising its traditional authority to require the plaintiff to resort to a more convenient and appropriate forum.

Where in the almost twenty-year history of a statute, only two circuits have addressed the issue and both are in agreement, the issue is simply not certworthy.

C. Petitioners' Public Policy Argument Is Misplaced And Unavailing.

In support of their contention that this Court should exercise its supervisory authority to reverse the decision below, petitioners argue that civil RICO claims are an integral part of an enforcement scheme similar to the federal antitrust laws. Based on that analogy and this Court's decision in *United States* v. *National City Lines, Inc.*, 334 U.S. 573 (1948) ("*National City Lines I*"), petitioners argue that complaints containing RICO claims should be absolutely immune from dismissal on *forum non conveniens* grounds. Petitioners' argument, which is completely devoid of any support in RICO's legislative history, should be rejected because it ignores (i) important substantive differences between the antitrust statutes and RICO that bear directly on the *forum non conveniens* analysis, (ii) the principles of international comity adopted in *Reyno*, and (iii) this Court's decision in *United States* v. *National City Lines, Inc.*, 337 U.S.

78 (1949) (*"National City Lines II"*), which largely superseded *National City Lines I.*

(i) Petitioners' public policy argument is based on the assumption that RICO's statutory purpose would be "destroyed" by a *forum non conveniens* dismissal because foreign courts will not entertain claims for RICO treble damages. Petn. at 6. Although the inability of foreign courts to entertain *antitrust* claims may argue against dismissal of such claims on *forum non conveniens* grounds, the analogy simply does not work when applied to RICO.

The antitrust statutes constitute a form of economic regulation that was, and in many ways still is, unique to the United States. These statutes make conduct that is permissible in other countries unlawful in the United States and provide remedies in a U.S. court that are simply not available in any shape or form in most foreign countries. By contrast, RICO created a statutory cause of action based on various types of misconduct, such as fraud, that are unlawful in every civilized country throughout the world. Thus, although a plaintiff who is required to bring suit in a foreign forum will not be able to take advantage of RICO's treble damage provisions, he will ordinarily be able to obtain redress for the alleged misconduct in the alternative forum.

If an antitrust claim is dismissed on *forum non conveniens* grounds, the alternative remedy (in the words of *Reyno*) will almost always be "so clearly inadequate or unsatisfactory that it is no remedy at all." *Reyno*, 454 U.S. at 254. *See Laker Airways Ltd.* v. *Pan American World Airways*, 568 F. Supp. 811, 818 (D.D.C. 1983). Where a claim is brought under RICO, on the other hand, and the court has determined that the plaintiff has an adequate remedy for the alleged misconduct in a foreign forum, there is no public policy reason why the ordinary *forum non conveniens* analysis should not be applied. As the Court observed in *Reyno*, where the foreign remedy is adequate "the incremental deterrence

that would be gained if [the] trial were held in an American court is likely to be insignificant." *Reyno*, 454 U.S. at 260-61, quoted and relied upon by the District Court here, *see* Petn. at C-13-14.

(ii) Petitioners' public policy argument also fails to acknowledge that a foreign forum may have an interest in enforcing its own comprehensive regulatory scheme that far outweighs the generalized American interest in the enforcement of civil RICO claims. *Reyno* holds that such interests should be considered in the *forum non conveniens* analysis. In *Reyno* itself, this Court held that where Scottish law would apply to several claims and where the incident occurred in Scottish airspace and there were Scottish victims, public policy required dismissal in favor of a Scottish forum.

In this case, the interest of the foreign forum is far stronger than it was in *Reyno*. Bermuda is the third largest reinsurance market in the world. Because the continued credibility of that market is crucial to Bermuda's economic health and well-being, the Bermuda government closely regulates the insurance companies doing business under its jurisdiction.[3] Here, both parties to the reinsurance agreements at the heart of the dispute are Bermuda companies. The petitioners themselves are a Bermudian and an Englishman, acting as liquidators appointed by a Bermuda court pursuant to Bermuda law. Moreover, at least two of the claims made by petitioners must be tried under Bermuda law, and the key accounting issue will be whether a Bermuda company, audited in accordance with Bermuda law by Bermudian accountants, acted in accordance with generally accepted accounting principles in Bermuda. Petn. at C-12.

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[3] Bermuda's interest in Mentor was graphically demonstrated when it took official action to prevent Mentor's records from being transferred out of the country. Petn. at C-12.

In contrast to Bermuda's direct and immediate interest in the legal issues and the outcome of the present case, the United States has only the generalized interest shared by all countries in deterring fraudulent practices. Under *Reyno*, such an interest is plainly not enough to require an American court to decide complex issues of foreign law at the behest of a foreign plaintiff and without the benefit of live testimony from critical witnesses.

(iii) In support of their analogy to the antitrust statutes, petitioners also rely on the fact that RICO, like the antitrust statutes, contains a special venue provision giving a plaintiff a broad choice of venues in which to bring suit. Relying on *National City Lines I*, petitioners argue that the District Court had no power to deprive them of their choice of forum. In so arguing, petitioners conveniently ignore not only this Court's subsequent opinion in *National City Lines II*, but also the complete absence of any mention of *forum non conveniens* in RICO's legislative history.

National City Lines I involved an antitrust action brought by the United States against a number of domestic companies for purely domestic activities. Defendants moved for dismissal of the complaint in favor of another, more convenient federal district court under the common law doctrine of *forum non conveniens*. The first time the case was before it, this Court held that the legislative history of the antitrust special venue provisions, as shown in extensive debates and committee reports, evidenced an undeniable congressional intent to give the plaintiff an absolute right to choose his forum, which could not be overridden for reasons of judicial efficiency. *See* 334 U.S. at 582-588.

Shortly after *National City Lines I* was decided, Congress enacted 28 U.S.C. § 1404(a), which essentially codifies the common law of *forum non conveniens* by permitting transfers between districts for reasons of convenience. In *National City Lines II*, this Court reversed the

result reached in its original opinion, holding that antitrust cases were subject to transfer under § 1404(a). In a companion case to *National City Lines II*, *Ex parte Collett*, 337 U.S. 55 (1949), the Court explained that the continued presence of a special venue statute was not a bar to the application of § 1404(a). As the Court observed, such provisions standing alone "denote nothing, one way or the other, respecting *forum non conveniens*." 337 U.S. at 61. Thus, instead of having to repeal special venue provisions in statutes where the Court had found *forum non conveniens* unavailable, Congress could and did "remove [the Court's] judicial gloss" prohibiting *forum non conveniens* dismissals by enacting § 1404(a). *Id.*

It is against this background that Congress' adoption of special venue provisions for civil RICO cases must be viewed. By the time Congress enacted RICO in 1970, the common law doctrine of *forum non conveniens* was firmly established.[4] Furthermore, the notion that special venue statutes automatically give plaintiffs an absolute right to choose their forum, without regard to the convenience of the parties, had been rejected by this Court more than twenty years earlier. Indeed, the Court had specifically pointed out that special venue provisions, which simply allow a plaintiff to bring suit in particular courts, by their very nature "denote nothing, one way or the other, respecting *forum non conveniens*." *Ex parte Collett*, 337 U.S. at 61.

Under these circumstances, Congress' mere inclusion of a special venue provision in RICO, without any indication of any intent to abrogate the doctrine of *forum non conveniens*, cannot be viewed as a conscious decision to prohibit the application of the doctrine under traditional

[4] Unlike RICO, the antitrust statutes had been enacted long before this Court held in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), that the doctrine of *forum non conveniens* applies to actions at law.

principles. If Congress had wanted to limit *forum non conveniens* transfers or dismissals in civil RICO cases, it needed to do so—and knew that it needed to do so—explicitly. *See Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 267 (1979) (changes in or abrogation of the common law must be clearly and plainly expressed by the legislature).

As the Fifth Circuit found in rejecting petitioners' argument below, there is nothing in the legislative history to suggest that Congress ever considered—let alone mandated—a departure from ordinary *forum non conveniens* analysis in RICO cases: "Our independent review of the legislative history does not disclose that Congress intended directly or indirectly or by fair inference that RICO would be immune from the doctrine's operation." Petn. at A-11. *Accord, Transunion Corp.* v. *Pepsico, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) ("A review of the legislative history of RICO . . . discloses no mandate that the doctrine of forum non conveniens should not apply.")

Petitioners' arguments based on public policy and the analogy between the antitrust statutes and RICO were properly rejected by the courts below. The appropriate test to be applied to respondents' motion to dismiss the complaint on *forum non conveniens* grounds was the test set forth in *Reyno*. Both the District Court and the Court of Appeals applied that test here. There is no reason for this Court to review their determination that petitioners' claims should be resolved in Bermuda.

II. NONE OF THE COLLATERAL REASONS OFFERED FOR CERTIORARI HAS ANY MERIT

Petitioners offer three additional reasons for granting certiorari, or at least postponing the denial of their petition. First, they argue that the decision below was an abuse of discretion. Second, they argue that the *forum non conveniens* dismissal violates their Seventh Amendment right to jury trial because they will not have a

right to a jury in Bermuda. Finally, petitioners suggest that the case should be held for *Tafflin* v. *Levitt, cert. granted,* —— U.S. ——, 109 S.Ct. 2428 (1989). None of these arguments has any merit.

A. Petitioners' Failure Even To Address Their Abuse Of Discretion Claim Properly Reflects Its Merits.

Petitioners ask, as their second "Question Presented," whether the District Court abused its discretion in its analysis of the public and private interest factors set forth in *Reyno* and *Gilbert.* Petitioners' text, however, does not address this argument at all. The detailed analysis of the District Court suggests why petitioners abandoned this argument. The District Court went through a lengthy analysis of all of the relevant considerations. The Court of Appeals reviewed that analysis and found no abuse of discretion.

The Court of Appeals' affirmance was plainly correct. More important, however, petitioners have not offered any reason why this Court should second-guess the Fifth Circuit's decision and inquire into the District Court's weighing of the facts of this particular case. *See Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949), where the Court declined to review findings of fact that were affirmed by the appellate court in the absence of a "very obvious and exceptional showing of error."

B. This Court Decided The Jury Trial Issue In *Reyno.*

Petitioners argue vigorously that lack of a jury trial in Bermuda bars dismissal on *forum non conveniens* grounds. Petitioners acknowledge, however, that they failed to raise this argument below. *See* Petn. at 12. For that reason alone, the argument should not be considered. See *Tacon* v. *Arizona,* 410 U.S. 351 (1973).

In any event, the jury trial argument has already been rejected by this Court. As petitioners themselves state in making their Seventh Amendment argument:

> [V]arious Courts have observed that a lack of a jury trial in a foreign forum does not render that forum unfair for purposes of a *forum non conveniens* analysis. *See, e.g., Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 252 n. 18 (1981) [additional citations omitted].

Petn. at 11.

Nothing more need be said.

C. There Is No Reason To Hold This Case For *Tafflin*.

Finally, petitioners imply that this case should be held for *Tafflin* v. *Levitt, cert. granted*, —— U.S. ——, 109 S.Ct. 2428 (1989). *Tafflin*, however, has nothing to do with *forum non conveniens*. In *Tafflin*, this Court granted certiorari limited to the question whether state courts have concurrent jurisdiction with federal courts over RICO claims—an issue on which there is a conflict in the Circuits. Here, all parties acknowledge that Bermuda courts do *not* have jurisdiction over RICO claims. The question here is whether, under *Reyno*, the lack of RICO's treble damage remedy bars a dismissal on *forum non conveniens* grounds. There is no conflict in the Circuits on this point, and nothing in *Tafflin* is likely to change the analysis or to make the *forum non conveniens* issue more certworthy.

CONCLUSION

The District Court and the Court of Appeals correctly applied settled law. All of petitioners' substantive claims can be addressed in Bermuda. There is a predominance of Bermudian witnesses and documents, and key fact witnesses are not amenable to trial subpoenas in the United States. The case involves significant questions of Bermuda law and Bermudian accounting practices as applied to two Bermuda companies, and the petitioners themselves are suing in their capacities as liquidators appointed by a Bermuda court. Under these circumstances, the District Court properly dismissed the case on *forum non conveniens* grounds.

It is time for petitioners to proceed with their claims in Bermuda. The petition for certiorari should be denied.

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